Supreme Court, U.S.
FILED
AUG 31 1987
JOSEPH F. SPANIOL, JR.
CLERK

(4)

No. 87-91

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

GEORGE BREWSTER, Petitioner

v.

MOUNT VERNON HOSPITAL, et al.,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY TO BRIEFS IN OPPOSITION

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24 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. REPLY TO BRIEF IN OPPOSITION OF HOSPITAL 1

A. Ample reason to consider whether state statute is unconstitutional. 1

1. Raised in complaint 1

2. Raised in District Court 2

3. Raised in Court of Appeals ... 3

4. Precedent 4

B. All parties participated in detaining or treating Brewster against his will 4

C. Facts alleged by the hospital are scandalous and should be disregarded and striken 5

D. Argument: A detention order is prima facie evidence of state action 6

1. Complaint alleges ample facts of state action and has the detention order attached 6

2. Brewster was detained and treated as part of a civil commitment procedure and was not simply evaluated 7

3. No relevant opposition to detention order as prima facie evidence of state action 9

II. REPLY TO BRIEF IN OPPOSITION OF POLICE 12

A. Scandalous material should be disregarded and striken 12

B. Argument: Police are responsible 13

1. Police should have known they violated constitutional rights 13

2. Judgment not allowed when genuine issue of any material fact 15

3. Causal link between petition for commitment and ensuing detention and treatment 15

III. CONCLUSION 19

TABLE OF AUTHORITIES

Cases:

Anderson v. Creighton, No. 85-1520 slip opinion (1987) 14

Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) 5

Davis v. Scheuer, 468 U.S. 183 (1984)..16

Fountain v. Filson, 366 U.S. 681 (1949) 16

Harris v. Pirch, 677 F.2d 681 (8th Cir. 1982) 15

Malak v. Associated Physicians, Inc., 784 F.2d 277 (7th Cir. 1986) 11

Martinez v. California,
444 U.S. 277 (1980) 18

McKinney v. George,
726 F.2d 1183 (7th Cir. 1984) 15

Morrison v. Washington County, Ala.,
700 F.2d 678 (11th Cir. 1983) 11

O'Connor v. Donaldson
422 U.S. 563 (1975) 6

Poller v. Columbia Broadcasting
Systems, Inc., 368 U.S. 464 (1962) . 16

Robb v. City of Philadelphia,
733 F.2d 286 (3d Cir. 1984) 10

Constitutional Amendment:

XIV 2

Statutes:

Va. Code Sec. 37.1 7

Va. Code Sec. 37.1-64(2) 7

Va. Code Sec. 37.1-67.1 ..... 7, 8

Va. Code Sec. 37.1-67.3 7

Va. Code Sec. 37.1-67.4 8

Rules:

Fed. R. Civ. Proc. Rule 56(c) 15

Fed. R. Civ. Proc. Rule 56(e) 15

Supreme Court Rule 34.6 6

REPLY TO BRIEFS IN OPPOSITION

Petitioner replies first to the Brief in Opposition of Respondents Hospital and Health Care Providers (Brief in Oppo. of Hospital), secondly to the Brief in Opposition of Respondents Police Officers Gideon and Moore (Brief in Oppo. of Police). Replies are listed in order of topics raised in the petition.

I

REPLY TO BRIEF IN OPPOSITION OF HOSPITAL

A. Ample reason to consider whether state statute is unconstitutional.

1. Raised in complaint.

The hospital argues that Brewster's claim that Virginia civil commitment statute is unconstitutional was raised "for the first time in his petition" and should not be considered (Brief in Oppo. of Hospital, p. 5).

Brewster clearly raised the unconstitutional issue of the state statute

throughout his complaint (App. 1-16)[1]: particularly paragraph 6, "Fourteenth Amendment" (App. 6); paragraph 8, "acts ... done ... under the color ... of the statutes ... of ... Virginia" (App. 6; and Brief in Oppo. of Hospital, p. 7); and paragraph 32 "detention order was in effect a nullity because there was no appearance before a magistrate or judge" (App. 11).

2. Raised in District Court.

Brewster raised the issue throughout his arguments in District Court, e.g., "we say they used a state statute and violated his constitutional rights" (App. 121). The District Court recognized the issue and implicitly decided the statute was constitutional when it stated, "The Court feels that the statute that they were acting under would give them good

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1. Such references are to the page of the Appendix filed with the Court of Appeals.

faith immunity" (App. 149; and Brief in Oppo. of Police, App. B Transcript p. 15).

3. Raised in Court of Appeals.

Brewster raised the issue throughout his appeal: e.g., "illegality of the Virginia statute" (Brief of Appellant, p. 19) and "It is clear that not only is the Virginia Statute illegal and unconstitutional ... " (Rebuttal Brief of Appellant, p. 4). The issue even was acknowledged by the appellees: "Those decisions involve for the most part whether a particular state commitment procedure comported with federal constitutional due process" (Brief of Appellees, p. 9).[2] The Fourth Circuit recognized the issue and implicitly decided the statute was constitutional when it affirmed the District Court's decisions (petition, App. E-6).

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2. An argument repeated in the Brief in Oppo. of Hospital (p. 10).

4. Precedent.

In another case in which the question of federal statutory preemption was not even raised in the petition, this Court granted certiorari and ordered the parties to argue the question, stating that the conflict was raised in the complaint, and acknowledged by both the District Court and the Court of Appeals. Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 698 (1984).

B. All parties participated in detaining or treating Brewster against his will.

Opposition of specific respondents (Brief in Oppo. of Hospital, pp. 7-10) was answered in the petition (pp. 26-35): they participated in detaining or treating Brewster against his will.[3]

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3. Respondents do not include Linda Anderson (Brief in Oppo. of Hospital, p. 1, n. 1). Brewster listed her because she was listed as an appellee (Brief of Appellant, p. 1 and cover; Rebuttal Brief of Appellant, p. 1 and cover; Brief of Appellees, p. 1).

C. Facts alleged by the hospital are scandalous and should be disregarded and striken.

The hospital cites an "indecent exposure charge" (Brief in Oppo. of Hospital, p. 2): misleading and inflammatory, as the charge was untrue, eventually dropped, and no lawful basis for attempting to commit Brewster to a mental institution.

The hospital alleges as fact that "Brewster indicated to Magistrate Hetzer that he was threatening harm to himself" (Brief in Oppo. of Hospital, p. 2): false and unsubstantiated. Brewster is the only available person with direct knowledge of his conversation, briefly explained in his petition (pp. 1-3), as Magistrate Gardner apparently now is retired and unavailable for questioning.

The hospital alleges as fact that Brewster had a "diagnosis of schizophrenic disorder" (Brief in Oppo. of Hospital, pp. 3-4): impossible, explained in his

petition (pp. 7-8, and n. 3).[4]

These allegations are false, misleading, inflammatory, unsubstantiated, or impossible. They are scandalous and should be disregarded and striken by the Court, in accord with its Rule 34.6.

D. Argument: A detention order is prima facie evidence of state action.

1. Complaint alleges ample facts of state action and has the detention order attached.

The hospital argues it did not act under color of law and that Brewster did not "allege sufficient facts" in his complaint (Brief in Oppo. of Hospital, p. 7). Brewster alleged ample facts in detail in the complaint (App. 1-16; petition, pp. 1-11): perhaps most succinctly illustrated in the complaint by paragraph 8, "acts ... were done ...

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4. This Court has recognized the fallibility of medical and psychiatric diagnosis. See O'Connor v. Donaldson, 422 U.S. 563, 584 (1975).

under the color ... of the statutes ... of Virginia" (App. 6; and Brief in Oppo. of Hospital, p. 7); and paragraph 32 "The alleged detention order is attached as plaintiff Exhibit One" (App. 11).

A detention order is prima facie evidence of state action, or color of law, whether the order is valid or invalid. See petition (pp. 26-29).

2. Brewster was detained and treated as part of a civil commitment procedure and was not simply evaluated.

The hospital argues "Brewster was not the subject of a commitment proceeding" (Brief in Oppo. of Hospital, p. 10), consequently cases he cites do not apply (id.), and "this case thus becomes one of claimed medical malpractice" (id., p. 15).

Brewster replies Virginia Code Sections 37.1-67.1 and 37.1-67.3 are part of Virginia Code Section 37.1 on civil commitment[5], he was subjected to detention

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5. Virginia Code Section 37.1-64(2) cites

and treatment under the statute, and he had a commitment hearing. So cases apply.

Brewster is a victim of both civil rights violations and malpractice.[6] The mere fact that respondents "gave Mr. Brewster drugs which he did not want" (Brief in Oppo. of Hospital, p. 14) violates his civil rights (regardless of malpractice). See petition (pp. 18-20) on forced drugging.

The hospital's argument that "the purpose for which he was there was not custodial, but rather so that the physicians and hospital staff could exercise their independent medical judgment" (Brief in Oppo. of Hospital, p. 12) contradicts the facts or common sense: (1) detention is custodial, as is civil commitment, (2) Dr. Cooper (see petition, pp. 9, 33) is

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"Involuntary admission by the procedure described in Sections 37.1-67.1 through 37.1-67.4."

6. The medical malpractice issue is not before this Court.

the alleged independent medical judge, not the hospital, (3) respondents could not use independent medical judgment in evaluating Brewster, because the hospital (especially Fortescue) was responsible for obtaining the detention order to begin with, i.e., the detention order cites the advice of Fortescue (App. 14), (4) if respondents used independent medical judgment, they would function like Dr. Cooper and play no role in detaining or treating Brewster, and receive no financial gain from his detention or treatment, and (5) a psychiatric evaluation can be conducted in an office, without involuntarily detaining and treating in a hospital (especially for three days).[7] For further lack of independence, see infra, pp. 16-17.

3. No relevant opposition to detention order as prima facie evidence of state action.

Most opposition was addressed in the

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7. Dr. Cooper conducted his "evaluation" for

petition. E.g., Brewster distinguished the Fourth Circuit cases from his case. See petition (pp. 31-35). There is no relevant opposition to Brewster's arguments.[8]

Opposition to Robb v. City of Philadelphia, 733 F.2d 286 (3d Cir. 1984) because "medical judgment by private physicians are not the exclusive prerogative of the state" (Brief in Oppo. of Hospital, p. 16) overlooks that Robb is an example of state action on the part of private citizens acting in concert with city officials (petition, p. 23). Involuntary detention is a state function, and the hospital acted in concert with the state when the state (the magistrate and Moore)

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approximately 30 seconds. Dr. Robertson conducted his without even interviewing Brewster. "Evaluation" even was conducted simply over the phone by the magistrate when he issued an oral order.

8. The hospital always placed great emphasis on government funding (Brief in Oppo. of Hospital, p. 17), not Brewster (App. 94-95, 119).

substituted the judgment of a private party (Fortescue) for their own, i.e., that Brewster should be detained and treated as part of the civil commitment process.

Opposition to Morrison v. Washington County, Ala., 700 F.2d 678 (11th Cir. 1983) because Brewster "did not claim that the drugs were given for any non-medical reason" (Brief in Oppo. of Hospital, p. 14) is not relevant to precluding summary judgment because of a material fact issue. See petition (pp. 28-29).

The hospital opposes Malak v. Associated Physicians, Inc., 784 F.2d 277 (7th Cir. 1986) because the hospital in Malak is publicly owned and the employees "therefore were held to be state actors" (Brief in Oppo. of Hospital, p. 15). Respondents overlooked the "private group" (Associated Physicians, Inc.) who were not employees of the hospital. See Malak, at 278.

Respondents argue that the Court should consider the "chilling effect": that "Holding them liable for such claims will discourage health care providers from providing such services" (Brief in Oppo. of Hospital, p. 17, n. 7). Brewster replies that holding them liable will discourage them from violating the civil rights of innocent persons.

II

REPLY TO BRIEF IN OPPOSITION OF POLICE

A. Scandalous material should be disregarded and striken.

See supra, pp. 5-6, for objections to alleged facts of "indecent exposure charge", "stated he was very depressed and threatened to harm himself" and "diagnosis of schizophrenic disorder" (Brief in Oppo. of Police, pp. 6-7, 11-12, 17).[9] Nor are such alle-

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9. The reference to "two magistrates" (Brief in Oppo. of Police, p. 3) is false and misleading. These are not the two magistrates (Gardner and Hetzer) discussed in the petition (pp. 1-3). Hetzer and Aunon (a magistrate and special justice)

gations any basis for an attempt at civil commitment. See petition (pp. 15-17).

B. Argument: Police are responsible.-

1. Police should have known they violated constitutional rights.

Police argue "A reasonable officer would not believe that temporarily detaining a suicidal[10] individual for a mental evaluation under these circumstances would violate his constitutional rights"(Brief in Oppo. of Police, p. 12). Brewster showed in detail how police should have known. See petition, pp. 35-42).[11]

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were parties below, because the detention order was signed, "David A. Hetzer per José Aunon" (App. 14). What this means never was determined.

10. Brewster was not suicidal and this accusation was not substantiated. Fortescue rated him very low as suicidal (App. 57); if he were a suicidal emergency, he would not have been interviewed for over three hours before a written detention order was issued (App. 15, 54). (And if Magistrate Gardner alleged suicide by phone, he had no authority to issue an oral order without proper advice; nor could Magistrate Hetzer issue a written order without proper advice, according to statute.)

11. Police should have known of the well perceived right to an attorney when detained.

Note that the recent case in this Court (Brief in Oppo. of Police, p. 10) was remanded:

> Thus, on remand, it should first be determined whether the actions (alleged) are actions that a reasonable officer could have believed lawful. Anderson v. Creighton, No. 85-1520, slip opinion (1987), at 11, n. 6 (Scalia, J.).

Also note, "subjective beliefs ... are irrelevant." Id., at 6 (Scalia, J.).

Brewster cited ample authority in his petition (pp. 11-22) that civil commitment is unconstitutional but agrees this Court never may have ruled so (Brief in Oppo. of Police, pp. 11-12, n. 5), which strengthens the reason this Court should grant the petition, as the matter is of importance. See petition (pp. 45-48).

Because Brewster is arguing constitutional violations, Davis v. Scheuer, 468 U.S. 183, 194 (1984) (Brief in Oppo. of Police, p. 15) is not relevant (immunity not lost simply because state

statutes are violated).[12]

In District Court, Brewster distinguished McKinney v. George, 726 F.2d 1183 (7th Cir. 1984) (Brief in Oppo. of Police, p. 13): "no knife, no ... screaming, no emergency at any time" (App. 145).

Harris v. Pirch, 677 F.2d 681 (8th Cir. 1982) (Brief in Oppo. of Police, p. 13) does not apply because in Harris (1) there was no detention order or petition for commitment (no causal connection) and (2) no allegation of an unconstitutional statute. Harris, supra, at 685.

2. Judgment not allowed when genuine issue of any material fact.

Police cite Rule 56(e) of Federal Rules of Civil Procedure (Brief in Oppo. of Police, p. 16) but overlook Rule 56(c), which states that summary judgment should

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12. Even if they follow state statute, they violate constitutional rights. See petition (pp. 11-22).

be entered only when pleadings, depositions, affidavits, and admissions filed show no genuine issue as to any material fact. Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 467 (1962). Fountain v. Filson, 366 U.S. 681 (1949).

Brewster filed ample affidavits showing genuine issues: e.g., the detention order with form attached showing Moore as petitioner. Police affidavits were conflicting (App. 142). For disputes of other material facts, see petition (pp. 23-24).

3. Causal link between petition for commitment and ensuing detention and treatment.

Police argue "the health care providers independently decided to subject Brewster to a course of medication and treatment" (Brief in Oppo. of Police, p. 18).

The hospital could not independently detain and treat Brewster if the police

did not bring him there (under false pretenses), prevent him from leaving, and participate in obtaining a written detention order authorizing detention and treatment. Nor was it an independent evaluation with the police communicating to the hospital a false and unsubstantiated accusation of threatening to harm himself, and inflammatory details[13] about a criminal accusation.[14] For other discussion of lack of independence, see infra, pp. 8-9.

There is a causal link between Moore's petition for commitment and the ensuing detention and treatment. Moore should have known he lacked probable cause to petition for commitment. See petition (pp. 38-43).

Also, Moore knew Fortescue recommended drugs despite Brewster's objections, as Moore was present during the interrogation;

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13. Details which Moore said he could not tell Brewster (and which Brewster did not even know at the time).

14. Brewster told them he did nothing wrong and that the charge was mistaken identity.

and the detention order, which he executed (App. 15), referred to Fortescue's report:

> Recommended detention. ... Needs stabilization on medication and eventually a consistent therapeutic contact to monitor his compliance with treatment (App. 54).

Moore participated in locking Brewster in solitary confinement (a form of treatment) without warning or hearing (App. 62, 68). This is not good faith nor a break in the causal chain.[15]

Martinez v. California, 444 U.S. 277 (1980) (Brief in Oppo. of Police, p. 19) does not apply (parolee killed innocent bystander some five months after he was released so death was too remote). In Brewster's case the causal connection between the police and the detention (and damages) was immediate.

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15. Police distinguish good faith from proximate cause (Brief in Oppo. of Police, p. 5, n. 2). The two are inseparable as far as actions of the police are concerned. Brewster's arguments in the Fourth Circuit, as in this Court, of police responsibility apply to good faith immunity as well.

III

CONCLUSION

The importance and substantiality of the questions presented in the petition have not been denied. Brewster raises significant issues justifying the grant of certiorari.

In light of the inability of the respondents to face the issues presented in the petition without resorting to irrelevant cases or issues, the need for plenary review of the action below is indisputable. Indeed, petitioner suggests summary reversal is now in order and suggests the case be remanded to District Court for trial.

Respectfully submitted,

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August 31, 1987